SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

03/12/2002

CLERK OF THE COURT
FORM L000

HONORABLE MICHAEL D. JONES

P. M. Espinoza
Deputy

LC 2001-000695

FILED: _____

STATE OF ARIZONA

F TYLER RICH

v.

PETE QUIHUIS

DAVID BURNELL SMITH

PHX CITY MUNICIPAL COURT
REMAND DESK CR-CCC

MINUTE ENTRY

PHOENIX CITY COURT

Cit. No. #5998180-01, 02, 03

This Court has jurisdiction of this appeal pursuant to the Arizona Constitution Article VI, Section 16, and A.R.S. Section 12-124(A).

This matter has been under advisement since the time or Oral Argument on March 4, 2002. This decision is made within 30 days as required by Rule 9.8, Maricopa County Superior Court Local Rules of Practice. This Court has considered and reviewed the record and tape recording from the Phoenix City Court, and the Memoranda and argument of counsel.

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HONORABLE MICHAEL D. JONES P. M. Espinoza
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Appellant, Pete Quihuis, was arrested December 6, 2000 and charged with Driving While Under the Influence of Intoxicating Liquor, a class 1 misdemeanor in violation of A.R.S. Section 28-1381(A)(1), and Driving with a Blood Alcohol Content in Excess of .10, a class 1 misdemeanor in violation of A.R.S. Section 28-1381(A)(2). The State filed an allegation of a previous Driving While Under the Influence conviction within 60 months. Appellant filed a Motion to Dismiss claiming that the State lacked essential evidence to prove that he was in actual physical control of his vehicle at the time of the alleged crime. Appellant's Motion to Dismiss was scheduled for evidentiary hearing on August 21, 2001. On that date the trial court held a hearing on the Motion to Dismiss and heard the testimony of Phoenix Police Officer, F.J. Young. The trial judge (the Hon. Lynda Howell) denied Appellant's Motion to Dismiss. Thereafter, Appellant and Appellee entered into a stipulation to submit the issues of guilt and innocence to the trial court and waive their rights to a jury trial. Appellant was found guilty of both charges and guilty of having a prior conviction within 60 months. Appellant was sentenced to probation for 3 years with a condition that Appellant serve 120 days in jail; however, 60 days were to be suspended pending successful completion of an alcohol screening and treatment program. Appellant was ordered to pay a fine of $885.00 and jail fees of $1,284.00. Appellant has filed a timely Notice of Appeal in this case.

The first issue raised by Appellant on appeal concerns the sufficiency of the evidence to prove that he was in actual physical control of a motor vehicle. When reviewing the sufficiency of the evidence, an appellate court must not reweigh the evidence presented before the trial court to determine if it would reach the same conclusion as the original trier of fact.[1] All evidence will be viewed in a light most favorable to sustain a conviction and all reasonable inferences will be resolved

[1] *State v. Guerra*, 161 Ariz. 289, 778 P.2d 1185 (1989); *State v. Mincey*, 141 Ariz. 425, 687 P.2d 1180, cert.denied, 469 U.S. 1040, 105 S.Ct. 521, 83 L.Ed.2d 409 (1984); *State v. Brown*, 125 Ariz. 160, 608 P.2d 299 (1980).

against the Appellant.[2] An appellate court must afford great weight to the trial court's assessment of witnesses' credibility and should not reverse the trial court's weighing of evidence absent clear error.[3]

The trial judge recognized and cited to counsel the controlling authority on the definition of "actual physical control": the Arizona Supreme Court case of ***State v. Love.***[4] In that case the Arizona Supreme Court adopted a "totality of the circumstances" approach that:

> ...recognizes that each situation may be different and requires the fact finder to waive the myriad of circumstances in fairly assessing whether a driver relinquished control and no longer presented a danger to himself or others.[5]

The Arizona Supreme Court reasoned that unlike the test in ***State v. Zavala***[6];

> The totality of approach permits drunk driver's to be prosecuted under a much greater of variety of situations- - for example, even when the vehicle is off the road with the engine not running. The drunk who turns off the key but remains behind the wheel is just as able to take command of the car and drive away, if so inclined, as the one who leaves the engine on. ...under a totality analysis, the motorist

[2] ***State v. Guerra***, supra; ***State v. Tyson***, 129 Ariz. 546, 633 P.2d 355 (1981), cert.denied, 459 U.S. 882, 103 S.Ct. 180, 74 L.Ed.2d 147 (1982).
[3] In re: ***Estate of Shumway***, 197 Ariz. 57, 3 P.3d 977, review granted in part, opinion vacated in part 9 P.3d 1062; ***Ryder v. Leach***, 3 Ariz. 129, 77P.490 (1889).
[4] 182 Ariz. 324, 897 P.2d 626 (1995).
[5] 182 Ariz. at 327, 897 P.2d at 629.
[6] 136 Ariz. 356, 666 P.2d 456 (1983).

> will not receive automatic absolution with such a flick of the wrist but can still be found in "actual physical control" of the vehicle.[7]

And, the Arizona Supreme Court held:

> We hold that whether a driver had actual physical control is a question for the fact finder and should be based upon consideration of all the circumstances.[8]

Citing *Love*[9], the trial court denied Appellant's Motion to Dismiss, finding substantial evidence had been presented which warranted presentation of the issue to a jury. The trial court's ruling was supported by the testimony of Officer Young from the Phoenix Police Department. Officer Young testified that Appellant was arrested at 1:13 in the morning after she had been dispatched to 40th Street and Greenway and informed by the dispatcher that a citizen informant had reported a purple truck had hit two curbs and the driver was driving impaired. Upon arrival at the scene, Officer Young observed a maroon pickup truck stopped on the roadway at the intersection with a green light facing the truck. The truck's lights were on, the ignition was on, the motor was running and Appellant was passed out and slumped over the wheel. When the officer opened the door to Appellant's truck, she smelled the smell of alcohol. Clearly, the trial judge did not err in denying Appellant's Motion to Dismiss as there were sufficient facts and circumstances which would enable a fact finder to determine that Appellant has been in "actual physical control" of his motor vehicle at the time of his arrest.

The next issue raised by Appellant is whether the Phoenix Police had probable cause to make an arrest. Appellee argues

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[7] *State v. Love*, 182 Ariz. at 327, 897 P.2d at 629.
[8] Id., 182 Ariz. at 328, 897 P.2d at 630.
[9] Id.

this issue was not properly raised before the trial court. Certainly Appellant failed to file any written motions challenging the police officer's probable cause to arrest Appellant. However, Appellant's counsel argued lack of probable cause at the hearing on the Motion to Dismiss held on August 21, 2001. This Court will also consider the trial court's denial of the Motion to Dismiss as a denial of the Motion to Dismiss for all reasons, including Appellant's argument that the police lacked probable cause to make an arrest. Whether the police have probable cause to make an arrest is a mixed question of law and fact that an appellate court must review *de novo*.[10]

When information is received by a law enforcement officer's from a citizen who voluntarily comes forward to aid law enforcement, this information is presumed to be reliable.[11] Arizona cases have differentiated between "citizen complaints" and "anonymous tips."[12] An anonymous tip is untraceable information by an unknown caller which may, if sufficiently detailed to indicate that the informant came by the information in a reliable manner, be sufficient to justify the stop of a vehicle or an individual.[13] Arizona cases have supported the proposition that reliability is much greater from a "citizen complaint" where "an ordinary citizen volunteers information which he has come upon in the ordinary course of his (her) affairs, completely free of any possible ordinary gain."[14]

The trial judge's order denying Appellant's Motion to Dismiss in regard to the probable cause issue is also supported by the record of the evidentiary hearing of August 21, 2001. As previously explained, Phoenix Police Officer Young testified that she had heard the dispatcher describe a citizen complaint

[10] *State v. Rogers*, 186 Ariz. 508, 924 P.2d 1027 (1996); *State v. Gomez*, 198 Ariz. 61, 6 P.3d 765 (App. 2000).
[11] *State v. Diffenderfer*, 120 Ariz. 404, 486 P.2d 653 (App. 1978).
[12] *State v. Gomez*, supra.
[13] *State v. Altieri*, 191 Ariz. 1, 951 P.2d 866 (1997).
[14] *State v. Gomez*, 198 Ariz. at 63, 6 P.3d at 767, citing *State ex.rel. Flournoy v. Wren*, 108 Ariz. 356, 364, 498 P.2d 444, 452 (1972); see also, *State v. Lawson*, 144 Ariz. 547, 698 P.2d 1266 (1985).

regarding a “purple truck” that hit two curbs and, in the opinion of the citizen, the driver was impaired. And, when Officer Young arrived at the scene, she observed Appellant’s truck stopped in the roadway at the intersection facing a green light with the ignition on, motor running, lights on, and Appellant passed out over the steering wheel. Coupled with the officer’s smell of alcohol as she opened the door these facts clearly support a finding of probable cause to arrest the Appellant. Therefore, this Court determines *de novo* that these facts do establish probable cause for Phoenix Police Officer Young to have arrested Appellant on December 6, 2000.

IT IS THEREFORE ORDERED sustaining the judgments of guilt and sentences imposed by the Phoenix City Court.

IT IS FURTHER ORDERED remanding this case back to the Phoenix City Court for all further and future proceedings in this case.